SUPREME COURT, U. S.

Nos. 200, 206

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In the Supreme Court of the United States

OCTOBER TERM, 1969

LOUISVILLE & NASHVILLE RAILROAD COMPANY, ET AL.,
PETITIONERS

v.

NATIONAL MEDIATION BOARD, ET AL.

BROTHERHOOD OF LOCOMOTIVE ENGINEERS,
PETITIONER

v.

NATIONAL MEDIATION BOARD, BROTHERHOOD OF LOCOMOTIVE FIREMEN AND ENGINEMEN, ET AL.

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE NATIONAL MEDIATION BOARD IN OPPOSITION

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. in No. 200, pp. 1-19) is reported at 410 F.2d 1025.

The findings of fact, conclusions of law, and judgment of the district court (Pet. App. in No. 200, pp. 21-37) are reported at 284 F. Supp. 344.

JURISDICTION

The judgment of the court of appeals was entered on March 14, 1969. The petitions for writs of certiorari were filed on June 5, 1969, and June 6, 1969. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

Section 2, Ninth, of the Railway Labor Act requires the National Mediation Board to investigate disputes "among a carrier's employees as to who are the representatives of such employees * * *" and to certify the representatives of employees. The questions presented are:

1. Whether Section 2, Ninth, requires the Board to determine who will be the representative of future employees who may be hired under a program which has been proposed but not yet adopted.

2. Whether Section 2, Ninth, requires the Board to determine what craft or class certain employees belong in when there is no dispute as to who represents the employees.

3. Whether the carriers were justified in refusing to bargain over proposals made by the Brotherhood of Locomotive Firemen and Enginemen relating to promotion and training of engine service employees.

STATEMENT

This action was brought by the petitioner in No. 206, the Brotherhood of Locomotive Engineers (the "Engineers"), against the National Mediation Board, the Brotherhood of Locomotive Firemen and Enginemen (the "Firemen"), and six railroads.[1] The principal relief sought by the Engineers and carrier defendants, and granted by the district court, was an order compelling the National Mediation Board, acting under Section 2, Ninth, of the Railway Labor Act (45 U.S.C. 152, Ninth), to resolve a dispute between the Engineers and the Firemen concerning their respective rights to bargain with the carriers in the development and operation of training programs for locomotive engineers.

In August 1963, in order to prevent a national railroad strike, Congress enacted Public Law 88-108, 77 Stat. 132, which provided for a two-year period of compulsory arbitration of the protracted dispute over the reduction of the number of firemen serving on railroads.[2] The Arbitration Board convened pursuant to P.L. 88-108, known as Board 282, issued a ruling which permitted the nation's 200 carriers to eliminate up to 90 percent of the firemen's positions on freight trains, with procedures for the protection

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[1] The Louisville & Nashville, Southern Pacific, Great Northern, Illinois Central, Atlantic Coast Line, and St. Louis Southwestern. The carriers are nominal defendants, who support the position of the Engineers.

[2] The history of the dispute is set forth in *Brotherhood of R. Trainmen* v. *Akron & Barberton B. R. Co.*, 385 F. 2d 581, 588-592 (C.A.D.C.), certiorari denied, 390 U.S. 923.

of existing employees. Since locomotive engineers traditionally have been promoted from the ranks of firemen,[3] the elimination of approximately 18,000 firemen's jobs under the Award[4] has caused the industry to consider alternative methods of assuring a continued supply of trained engineers.

In 1965 the Firemen served notices on the carriers, under Section 6 of the Act,[5] proposing the establishment of a three-year apprenticeship program (J.A. 56, 60-61).[6] The term "Apprentice" was defined both as "a person who is engaged in learning the craft of locomotive Enginemen", and as "synonymous with the term 'firemen.'" (J.A. 56.) During the course of the proposed program, apprentices were to "perform all duties commonly referred to as

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[3] Report of the Presidential Railroad Commission (1962), p. 45: "Engineers have almost universally been promoted from the ranks of firemen who pass qualifying examinations."

[4] See *Akron & Barberton*, *supra*, n. 2, 385 F. 2d at 610 n. 1.

[5] 45 U.S.C. 156, Pet. App. No. 200, pp. 48-49.

[6] "J.A." refers to the Joint Appendix in the court of appeals. In 1960, the Engineers, Firemen, and other operating unions had jointly served notices on the carriers pursuant to Section 6 proposing the establishment of a four-year apprenticeship program for engine service employees, who were to be known as "locomotive helpers" for the first three years and as "apprentice engineers" for the fourth year (J.A. 140-141). This joint notice—which was consistent with a long-established bargaining pattern, in which the training, seniority, and promotion of engine service employees were covered by identical provisions in the carriers' collective agreements with both the Engineers and Firemen—was overtaken by the mounting controversy which led to the enactment of P.L. 88-108. See J.A. 137-152, 190-191, 237-244, 256.

Locomotive Firemen duties" (J.A. 69) and, upon satisfactory completion of the program, to receive a seniority date as locomotive engineer (J.A. 65).

The Engineers objected to the Firemen's proposals, claiming that they infringed upon its jurisdiction as representative of the craft of engineers. The Engineers offered its own proposals for a much shorter training program to be established by agreement between it and the carriers, claiming that a lengthy apprenticeship is unnecessary for training an engineer (J.A. 196).

Fearing a strike by the Engineers, the carriers then refused to bargain with the Firemen. Two of the carriers, the Louisville and Nashville and Great Northern, also unilaterally negotiated agreements with the Engineers. The only term of employment fixed by the L&N agreement (J.A. 25) is wages; all other terms are left solely to management discretion.

When the L&N and Southern Pacific railroads refused to negotiate with the Firemen over its notices, the Firemen invoked the mediation services of the National Mediation Board under Section 5, First, of the Act (45 U.S.C. 155, First). The Board docketed the case and scheduled mediation for August 4, 1966 (J.A. 121-122).

On July 1, 1966, the Engineers applied to the Board for a determination under Section 2, Ninth (45 U.S.C. 152, Ninth), of which union would represent new apprentices on the L&N. On July 22, 1966, after receiving the views of the carrier and both unions, the Board dismissed the Engineers' application on the ground that there had not been shown

to exist a dispute falling within the purview of Section 2, Ninth (J.A. 26-29). In response to a subsequent request of the carriers and Engineers that mediation be recessed or that the Board reconsider its dismissal of the Engineer's application, the Board stated the "Mediation sessions * * * will be held as scheduled" (J.A. 221-228).[7]

On August 4, 1966, the Engineers filed its complaint in the present case. As noted above, the district court granted the principal relief requested, compelling the Board to investigate the dispute under Section 2, Ninth, and to certify which union is the representative of apprentices training to be engineers on the L&N and Southern Pacific (Pet. App. No. 200, p. 34). The district court relieved the carriers of any duty "to confer, participate in mediation, or otherwise bargain with respect to the apprentice notices served upon them" by the Firemen, "unless and until the National Mediation Board determines, pursuant to an investigation under Section 2 Ninth of the Railway Labor Act, that the Brotherhood of Locomotive Firemen and Enginemen is the duly designated and authorized representative of apprentices training to become locomotive engineers on such carrier defendant" (Pet. App. No. 200, p. 36).

The court of appeals reversed, sustaining the position of the National Mediation Board that it lacked jurisdiction over the controversy under Section 2,

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[7] The August 4, 1966, sessions were held; however, the discussion apparently centered entirely upon the interunion dispute (J.A. 254). As the result of the present litigation, no further mediation sessions have taken place.

Ninth of the Act, and ruling that the carriers were required to bargain with the Firemen (Pet. App. No. 200, pp. 1-19).

ARGUMENT

1. The court below correctly held that the present dispute is not within the jurisdiction of the National Mediation Board under Section 2, Ninth, of the Railway Labor Act.

Section 2, Ninth, of the Railway Labor Act grants the National Mediation Board authority to resolve disputes "among a carrier's employees as to who are the representatives of such employees * * *." In the present case, however, there is no dispute even among the two unions and the carriers as to which union represents any existing employees. With respect to the L&N, the only carrier on which "apprentices" actually had been hired at the relevant times, the Firemen's Union does not contest the Engineers' representation of those employees.[8] More importantly, for the purpose of testing the Board's jurisdiction, there certainly is no dispute in this case "among a carrier's employees." As the Board has held for more than 30 years, with the approval of the District of Columbia Circuit, *Brotherhood of R. Trainmen* v. *National Mediation Board*, 135 F. 2d 780, 782-784 (C.A.D.C.), jurisdiction under Section 2, Ninth, must

[8] The legislative history of the Act strongly supports the Board's position that it is not required to make craft or class determinations unless there is a dispute concerning who represents actual, existing employees. See Hearings on H.R. 7650 before the House Committee on Interstate and Foreign Commerce, 73d Cong., 2d Sess. (1934), p. 56.

be premised on a representation dispute among individual employees and does not reach all jurisdictional disputes between unions. This requirement that there be a dispute among actual employees is recognized in the Board's regulations requiring applicants invoking its jurisdiction under Section 2, Ninth, to submit authorization cards from a certain percentage of employees. See 29 C.F.R. 1203.2; 29 C.F.R. 1206.2-.5.

The relief which petitioners in effect sought from the Board was not the resolution of a dispute among existing employees as to who are their representatives within the meaning of Section 2, Ninth, but an advance determination of the craft or class which will include future employees who may be hired as "apprentices" under some program which may be adopted in the future; no such employees had been hired on five of the six petitioning carriers at the time of the district court's decision. Section 2, Ninth, does not impose such a duty on the Board. The two unions have proposed substantially differing programs for the training of engine service employees, see pp. 4-5, *supra*, and the statute leaves the settlement of substantive terms of employment to private parties without compulsory arbitration. The Board therefore could not properly undertake to make a craft or class determination prior to the establishment of the program.[9] As the court below stated (Pet. App. No.

[9] The carriers claim (Pet. No. 200, p. 22) that "the NMB has settled jurisdictional disputes by drawing craft lines in situations indistinguishable from the case at bar." But none of the Board rulings relied upon for that proposition involved

200, p. 15):

> When the Board makes a craft or class determination concerning a group of employees, it does so partly on the basis of the kind of work those employees are doing. If their work looks more like the work traditionally done by firemen, that cuts in favor of certifying them as firemen; if it looks more like engineers' work, the Engineers' union is more likely to be certified as the representative.
>
> Here, the Board could not yet know the nature of what work, if any, the apprentices would be doing. * * *

Although petitioners contend that the decision below puts the carriers in a "dilemma" as to which union they are required to bargain with, the carriers here are not merely neutral parties caught between two quarreling unions. They are instead interested in the substantive terms of employment, and quite naturally seek to deal with the union which offers the training program most acceptable to them. To the extent that the carriers' position is difficult, that difficulty does not result from a misinterpreta-

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a situation like the present one, where the Board is asked either to determine 1) the craft into which non-existent future employees will fall, or 2) into which craft employees fall, when *no one* challenges an existing representative of those employees (here the L & N apprentices). The carriers' reliance (Pet. 19) on *Northwest Airlines, Inc.*, 2 NMB 19, 23 is misplaced. There the Board held that a carrier could not prevent employees from gaining an initial certification for their chosen representative by claiming that they were not in dispute among themselves. The result was plainly dictated by Section 2, Fourth, of the Act (45 U.S.C. 152, Fourth), which is of no assistance to the carriers here.

tion of the Act by the court below or the Board, but from the long history of involvement of two separate unions in the training, seniority and promotion of engine service employees. Moreover, it is a difficulty which is not incapable of resolution through the bargaining and mediation procedures which Congress evidently contemplated; as noted above (note 6, *supra*), at one time the two unions jointly proposed a mutually agreeable apprentice program.

The consequence of petitioners' position, on the other hand, would be that either firemen or engineers would be deprived of a voice in a matter which has a substantial effect on their livelihood. As the court below pointed out (Pet. App. No. 200, p. 11), the Firemen's proposals "can certainly be seen as economic protection for firemen not yet on the engineer seniority list. It would delay the infusion of new engineer recruits into those lists for three years, thus allowing present firemen a first crack at available engineer jobs." To deny the representatives of firemen an opportunity to try to negotiate a program for their training and promotion is entirely inconsistent with the purposes of the Railway Labor Act, and could place firemen in a "dilemma" in which they lose promotional opportunities without a chance at collective bargaining.

2. There is no conflict of decisions.

Contrary to petitioners' contentions, the decision below is not in conflict with any other appellate ruling. In none of the cases relied on by petitioners was the National Mediation Board a party; the cases con-

sequently could not have held that the Board was required to resolve the interunion disputes there involved. For example, *Brotherhood of Locomotive Fire & E.* v. *Louisville & N. R. Co.*, 400 F. 2d 572 (C.A. 6), certiorari denied, 393 U.S. 1050, held merely that the court could not make a craft determination, and hence could not enjoin the carriers' agreement with the engineers on the theory that it invaded the Firemen's jurisdiction. That ruling but follows the holding of this Court in *General Committee* v. *M.-K.-T. R. Co.*, 320 U.S. 323.

Southern Pacific Co. v. *Switchmen's Union of North America*, 356 F. 2d 332 (C.A. 9), is similarly distinguishable. There the court held that a carrier could refuse to bargain with a union over a proposal which would involve an area from which the union had been excluded by its own agreement, and that only the Board could change the craft lines. The Ninth Circuit did not delimit the circumstances in which the Board might be required to make a craft or class determination—the main issue here—but merely held that only the Board could take such action. It does not follow that because an interunion controversy may not be adjudicated by the courts, it is one which the Board is required to settle under Section 2, Ninth. Indeed, in *General Committee*, *supra*, this Court, while stating that Section 2, Ninth, was designed "to resolve a wide range of jurisdictional disputes," also recognized that some interunion disputes have been "left to those voluntary processes whose use Congress had long encouraged" and that there may be "many areas in this field where neither

the administrative nor the judicial function can be utilized;" this "is only to be expected where Congress still places such great reliance on the voluntary process of conciliation, mediation and arbitration." 320 U.S. at 336-337.

3. The court below correctly held that the carriers were required to bargain over the Firemen's proposals.

The premise of petitioners' position, in essence, is that a carrier can never be required to bargain with two unions over similar subject matter, notwithstanding past bargaining practices and the unmistakable interest of the unions and their members. The Board, on the basis of its lengthy experience with bargaining practices in this industry, rejected that view and advised the carriers that the proposals of both the Engineers and Firemen appeared to be proper (J.A. 100). Promotion, seniority, and training of engine service employees have long been the subject of bargaining with *both* unions—often resulting in identical contract provisions (J.A. 137-152, 190-191, 237-244, 256). In 1960, the unions jointly proposed an apprenticeship program, without objection that the joint proposal was inappropriate or that the firemen should be removed from the negotiations. Yet the district court's ruling which petitioners seek to reinstate would require the Board to eliminate the possibility of a settlement along the lines which both unions originally proposed.

It hardly can be contended, moreover, that the firemen lack a sufficient interest in the subject matter to require the carriers to bargain with them. Even under the Engineers' program, the apprentices obtain

seniority as firemen, and as railroad officials admitted, some are actually working as firemen upon completion of the program (J.A. 135, 137, 306, 321).[10]

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[10] The carrier's reliance (Pet. No. 200, 27-28) upon two decisions of the Court of Appeals for the Second Circuit involving a dispute over the reduction of the number of crew members in the cockpit of jet airplanes from four to three is misplaced. Prior to such reduction, there had been three pilots and a flight engineer, represented by different unions (the pilots association and the flight engineers); the basic dispute was whether the third man would be a pilot or a flight engineer, and which union would represent him.

Neither of those cases involved the question here presented of whether a carrier may be required to bargain with two unions. *Ruby* v. *American Airlines, Inc.*, 323 F. 2d 248, certiorari denied, 376 U.S. 913, involved a dispute among the pilots as to who was their representative; the court held that it was for the Board to make that decision, and it therefore could not enjoin the carrier from dealing with a new representative of pilots whom "the overwhelming majority of pilots have authorized * * * to act as their bargaining representative," although the Board had not certified it (323 F. 2d at 253). *Flight Engineers' Inter. Ass'n* v. *Eastern Air Lines, Inc.*, 311 F. 2d 745 (C.A. 2), certiorari denied, 373 U.S. 924, involved events after negotiations between the carrier and both unions had run the full course of the statutory bargaining process (see 311 F. 2d at 746). After the carrier had bargained in good faith with the flight engineers and the latter had called a strike, the carrier used self-help as the Act permits (*Railway Clerks* v. *Florida E.C.R. Co.*, 384 U.S. 238), replaced strikers and established terms of employment that were satisfactory to the other union. See *Flight Engineers Int. Ass'n, Eal Chap.* v. *Eastern Air Lines, Inc.*, 359 F. 2d 303, 308-309 (C.A. 2).

CONCLUSION

The petitions for writs of certiorari should be denied.

Respectfully submitted.

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